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Tracing Duty of Climate Care

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Abstract

Climate change poses an existential threat to mankind. The problem is being addressed at international level largely. The states coming together to address it with the help of following international legal instruments, UNFCCC 1992, Kyoto Protocol 1997, and Paris Agreement 2015 are well short of the mark to rescue the planet from being doomed. This situation has prompted non-profit foundations, social groups, indigenous communities, and environmental advocates to bring climate change litigations against their respective governments failure to reduce adequate greenhouse gases and to take adequate adaptation measures to save exposed population from the adverse effects of climate change. One of the tools which they are applying to seek redressal of their grievances are duty of care, traceable to the common law of tort of negligence.

Key words: climate change; duty of care; greenhouse gas mitigation and tort

Introduction

The various consequences of continuing greenhouse gas emissions into the atmosphere have been outlined in the successive Intergovernmental Panel on Climate Change (IPCC0 successive reports (IPCC). The successive IPCC reports confirm that human influence is unequivocally responsible for the warming of the atmosphere, ocean and land[1], which translates into adverse effects. The adverse effects of climate change include the loss of land and property, health and ecological damages, threats to human security and potential human casualties. International climate change negotiations have not been able to make the states reduce the required GHG needed to ensure a stable climate system. A stable climate system is the objective of the United Nations Framework Convention on Climate Change (UNFCCC) and any related legal instrument[2]. This can be achieved with the stabilization of atmospheric concentrations of GHG to a level which would result in the prevention of dangerous anthropogenic interference with the climate system. The achieving of a stabilization mark of atmospheric concentrations of GHG is needed to ensure our ecosystems to adapt and food production and economic development to take place in a sustainable manner. The UNFCCC did not identify any target of emission reduction to achieve a stabilization mark. Rather it laid down an initial nonbinding target of reducing emissions from industrialized countries to 1990 levels by the year 2000[3]. The Paris Agreement (PA) identifies restricting global average well below 2 degrees Celsius and further aspires towards 1.5 degrees Celsius as the stabilization mark. The IPCC has found that current pledges and commitments made by the Parties to the PA are not on the emission reduction pathways needed

to achieve the stabilization target rather it will result in global warming of around 2.7 degrees Celsius by 2100. In combating climate change and mitigating its adverse effects, the UNFCCC enshrines various principles which would apply in fixing of obligations. The Parties have to take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects[4]. The precautionary measures help in foreseeing and preventing man-made changes in climate change. In fact the first World Climate Conference called on "governments to foresee and prevent potential man-made changes in climate". The next section will trace the criteria of duty of care and the scope of its applicability in climate change.

Criteria of Duty of Care and its Scope of Applicability in Climate Change

Answering the duty of care requires answering when one person owes a duty of care towards another. Answering has been found to be challenging but conflicting answers have been located which say: when several general criteria are met (i.e. a duty of care test) or when a number of factual circumstances, which vary on a case-by-case basis, occur. In *Caparo Industries plc v Dickman*[5], considered as the leading case on the duty of care, the House of Lords attempted to address this issue in the most definitive terms. The House of Lords laid down a three-stage test[6]. A duty of care exists based on foreseeability, proximity and what is fair, just and reasonable. The question to be asked is whether there is a duty of foreseeability of harm on the part of the defendant to the petitioner. Are any specific injuries foreseeable-for example the impacts of specific storm surges or hurricanes-and when did such foreseeability arise? Courts will need to answer both questions in order to impose liability on defendants who are not currently taking steps to mitigate their climate impacts or did not begin taking concrete actions until well after the resulting injury was foreseeable. It will also require the following tests before imposition of liability: (a) degree of reliability that petitioner suffered harm; (b) proximity of connection between defendant's conduct and injury suffered; (c) moral blame attached to defendant's conduct; (d) policy of preventing future harm; (e) extent of burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (f) availability, cost, and prevalence of insurance for the risk involved[7].

It has been observed in the last two decades especially that human rights and climate change considerations are increasingly shaping tort law by focusing on the gradual expansion of the duty of care. The plaintiffs are leaning quite significantly on the tort instrument of duty of care against governments and private companies for their failure to lower their emission of greenhouse gases. The plaintiffs find it challenging to prove that the adverse effects of climate change on society, individuals and ecosystems have happened due to inaction on the part of government agencies and private individuals to mitigate greenhouse gases. For example, the proof of negligence by an agency that particular emissions of cars driven in New Delhi with reduced glacier snowpack in the Himalayan range. And even if a causal link can be established between the offending action and the harm, what is the proper measure of the car companies' liability in the face of multiple sources of greenhouse gases over an extended time period? These are challenging issues but the increasing number of climate change litigations in many jurisdictions warrant attention of two elements of negligence-the duty of care and its breach. Before discussing the application of duty of care in climate change litigations, it is needed to provide an overview on the duty of care in international law.

General Obligations of Duty of Care in International Law

As compared to duty of care towards plaintiff by a defendant, general duty of care in international law called due diligence obligation is used as a legal standard of conduct but only by reference to a pre-existing rule of international law. In this sense, if a state has acted with the required diligence under

a particular rule, it can avoid the bad outcome of being found to have violated the rule. In this case, the primary rule is the duty of prevention not to cause harm to another state. In fact, the no-harm rule is an extension of the Roman law maxim of "*sic utere tuo ut alienum non laedas*" (use your property so as not to injure that of another). The content of this rule has been shaped by *Trail Smelter* arbitration award in 1941.[8]The rule which states that "No state should use its territory in such a manner that results in significant injury to another state or areas beyond national jurisdiction" has been upheld as part of the customary international law by the ICJ's advisory opinion in nuclear weapon case.[9]The no-harm rule is an obligation of conduct not result, which means that a State is obligated to comply with the prevention duties to minimize the chance of harm to another. Article 3 of the International Law Commission's (ILC) 2001 Draft Articles on "Prevention of Trans-boundary Harm from Hazardous Activities" mentions that main duties relating to the prevention of significant transboundary harm, or minimizing at any rate the risk thereof, include taking "all appropriate measures."[10]The latter may include all legislative, administrative, and procedural duties with respect to an industrial activity likely to have a transboundary impact. The prevention duties or appropriateness of the measures will depend on the facts and circumstances of each particular case or situation.[11] In the *Pulp Mills* case 2010, the International Court of Justice (the ICJ) described undertaking an environmental impact assessment in a transboundary context as part of customary international law.[12]In the case, the ICJ added that "due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised" if a State failed to carry out an environmental impact assessment EIA before approving a project liable to affect trans-boundary environmental resources.[13]

The significance of this authority in the context of climate change is also relevant as there are treaty-based obligations to conduct an environmental assessment (EA) when harm could affect the Antarctica[14] or the high seas.[15] There are some scholars who argue that there is a new customary international law rule is being shaped by states which requires a state to carry out climate assessment (CA) before authorizing a planned activity likely to contribute significantly to climate change.[16] In their view, the inclusion of consideration for GHG emissions in national EA procedures is sufficiently widespread, representative, and consistent enough to constitute a prevailing and arguably, "general" practice.[17]While the inclusion of GHG in EA procedures is a clear trend, it is not a universal practice. What distinguishes a custom from mere usage is acceptance by States as it is their legal obligation (*opinio juris*).[18] It is quite difficult to establish this subjective element.[19] It is generally understood, as international courts and tribunals have held in successive cases, that States have accepted as law an obligation to carry an EA at least in a transboundary context.[20] The question here is whether States have accepted a similar obligation in the context of global environmental harm, namely GHG emissions.[21]

Obligation to Mitigate GHG in Climate Change Treaties

Prevention is an anticipatory principle that seeks to avoid foreseeable risks. It operates distinctively from the curative approach that international law traditionally adopts to respond to wrongful acts and seeks to avoid harm in the first place. The duty to prevent harm is not included in the operational part of the climate change treaties. The reason is traceable to the fact that the rich countries being primarily responsible for greenhouse gas emissions opposed any recognition of the no-harm principle and concomitant recognition of liability and compensation. The climate change treaties assign a duty to the Parties to reduce greenhouse gases in a very general term inspired from the principle of common but differentiated responsibility and respective capability. The scholars describe the obligations enshrined in the change treaties as a mixture of hard and soft obligations.

The duty to reduce GHG gases emanates from Article 2 of the United Nations Framework Convention on Climate Change (UNFCCC)

embodying the objective of the Convention.[22] Article 2 is (1) bound by the assumption that human beings interfere with the climate system by increasing atmospheric gas concentrations, and (2) assumes that human activities can prevent these gases from rising above a threshold of "dangerous interference." The Paris Agreement on Climate Change sets a particular threshold 2 to 1.5 degrees Celsius increase above pre-industrial levels as dangerous. There are scholars who are of the view that this obligation would be part of the general principles of international law and would further imply a duty to ensure that state climate policies respect human rights commitments under international law.[23] This argument seems to be making its impact on the nationally determined contributions (NDCs)[24] which all states party to the Paris Agreement on Climate Change have to prepare, maintain, and revise every five years. NDCs should reflect ambitious greenhouse gas mitigation targets in order to prevent further damage from climate change. It is worth noting that a party to the Agreement is not required to achieve the goal which it has set for itself in NDC, but they are required to take domestic measures in order to meet their NDC targets.

Applicability of Duty of Care and Human Rights Situation

There are a number of ICJ judgments which underline that the duty of care or due diligence obligation applies to a state, insofar as they exist within a particular primary treaty or customary rules of international law, within the particular field of international law. In the context of the primary rule of no harm and the UNFCCC obligation in Article 2, international law scholars have derived three standard of care factors to evaluate the due diligence of a state when its act has potential transboundary effect or its potential effect in areas beyond national jurisdiction.[25]The following three criteria, (1) the chance to act or prevent, (2) the foreseeability of harm, and (3) the proportionality of the choice of measures to prevent or to minimize risk, can be deployed to evaluate diligent conduct of states' efforts towards preventing excessive release of GHG emissions.[26] These criteria do not suggest specific rules of conduct; rather they leave room for states to determine which measures are necessary and appropriate and which are feasible and available within their capacities to achieve the given objective. The general definition of risks given by the International Law Commission (ILC) in its Draft Articles on "Prevention of Trans-boundary Harm from Hazardous Activities 2001" could, in principle, also cover activities that increase the risk of, or contribute to climate change damage.[27] Minimizing risk is defined in the ILC commentary as pursuing "the aim of reducing to the lowest point of the possibility of harm."[28] This definition is applicable in the context of climate change damage, and results in an obligation for all countries to contribute to stabilizing of greenhouse gas concentrations in the atmosphere to a level where substantial damage to land and people is prevented. Excessive emissions which result in dangerous anthropogenic interference with the climate system translate into substantial damage to land and people which in turn seriously undermines the right to life, to a private life, to a family, food, water and physical well-being. Several of these rights are protected human rights under global and regional human rights instruments.[29]It is also attributable to the malleability of human rights rules which makes it possible to bring a number of climate change linked impacts within their remit. As opposed to the malleability argument, the European Court of Human Rights ruled in *Ivan Atanasov v. Bulgaria* saying "Article 8 of the European Convention on Human Rights is not engaged every time causing environmental deterioration but only where there is a direct and immediate link between the impugned situation and the applicant's home or private or family life."[30] Moreover, an arguable claim under Article 8 may arise only where the hazard at issue attains a level of severity resulting in significant impairment of the applicant's ability to enjoy her home, private or family life.[31]

Duty of Care in Torts and its Applicability in Climate Change

Although prudence and caution hold the key in understanding duty of care, "[t]he word "duty" is used to denote the fact that the actor is required to conduct himself in a particular manner at the risk that if he does not do so he becomes subject to liability to another to whom the duty is owed for any injury sustained by such other, of which that actor's conduct is a legal cause."[32]Generally, the duty of care is traceable to the common law tort of negligence, which consists of conduct in which there is, from the defendant, usually either no advertence or insufficient advertence to the nature of the conduct and/or its consequences.[33]The following three ingredients differentiate negligent harm from intentional harm: "(a) a legal duty on the part of the defendant towards the plaintiff; (b) breach of that duty by conduct of that kind mentioned in; (c) harm resulting to the plaintiff as a consequence of that breach."[34] Additionally, the English common law protecting the use and enjoyment of private land provides the basis to bring private nuisance actions against those such as operators of a factory causing damage or unreasonable interference with their use or enjoyment of their land, typically with smoke, noise or effluent. In the wake of industrialization the employer or the operator is under a general duty of care to reduce risks "as low as reasonably practicable."[35] Duty of care has been used as a basis to pass legislations relating to health and safety at workplace.

Considering the above-mentioned definition, the duty element can be seen to suggest two separate questions: (i) to whom is the duty owed? (ii) what does the duty entail.

As climate change is being considered to be one of the defining challenges of our time, a variety of approaches are being deployed to deal with this challenge at global, regional and local level. The predominant one at the global level is anchored in the multilateral treaty regime comprising the United Nations Framework Convention on Climate Change (UNFCCC) 1992[36], the Paris Agreement 2015[37] and the rules adopted by the Conference of the Parties (COP) to the UNFCCC and the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement[38]. The multilateral approach has not been found to be in sight of preventing atmospheric concentrations of anthropogenic greenhouse gases from harmful human induced interference with the climate system. The channelling of climate actions envisaged in the Nationally Determined Contributions (NDCs) are estimated to result in global average temperature increase to 2.7 degree Celsius as compared to pre-industrial levels by the end of this century. The overshooting of the temperature goal of 2 degree Celsius agreed upon by the Parties to the Paris Agreement, let alone 1.5 degree Celsius, will deeply affect the enjoyment of human rights of present generation as well as future generation around the world. In some of the jurisdictions in Europe, the potential overshooting of the climate goal and its potential impact on the ecosystems, societies and children serves as ground of climate change litigation. The paper is broadly divided into two parts: (i) Duty of Care in the two important climate change litigation cases accruing within the territory of the Netherlands - *Urgenda v. The Netherlands*[39] and *Milieudefensie v. Shell*[40] (ii) No Harm Rule serving as the basis of duty of care substantiated over the years of the rule in judicial pronouncements and in other major international environmental law outcomes. The objective of the paper is to analyze the challenges and opportunities in the invocation of the duty of care in dealing with the mitigation of greenhouse gases in the domestic legal systems and international legal systems.

In both the cases, the Court relied upon the duty of care ensuing from Article 6:162 of the Dutch Civil Code requiring the defendant to take climate change mitigation. This provision defines tortious acts as including acts and omissions 'in violation of… what according to unwritten law has to be regarded as proper social conduct. The first is the *Urgenda v. The Netherlands,* where the Hague District found that the Netherlands had an

obligation to reduce its greenhouse gases (GHG) emissions by 25% by 2020 as compared to 1990. Second is the *Milieudefensie v. Royal Dutch Shell* where the District Court of The Hague passed an innovative judgment on 26th May, 2021, interpreting the Shell's duty of care towards the inhabitants of the Netherlands. The Court required the Shell (oil-gas company) to mitigate climate change by reducing its carbon dioxide emissions resulting from its global operations by at least 45% by 2030 as compared to 2019 level. On 12th November 2024, the Dutch Court of Appeal overturned the 2021 judgment given by the Hague District Court in the Shell case in sharp contrast to the *Urgenda* Judgment. In the latter, the Court of Appeal and the Supreme Court affirmed the judgment of the Hague District Court, albeit on a different legal basis.

Duty of Care as Mitigation Obligation

Urgenda Judgment

Use of a tort-based instrument to protect the environment is not new, but is currently being used to prevent climate change. In *Urgenda* Judgment, the Hague District Court ruled in 2015 that the Netherlands had breached the standard of due care by implementing a policy that would lead to a reduction of Co2 emissions by 2020 of less than 25% compared with 1990 emissions.[41] The Supreme Court of the Netherlands took similar line underlining "rights turn" and also saying "the States obligation to protect the right to life and the right to private and family life under Articles 2 and 8 respectively of the European Convention on Human Rights (ECHR) implied an obligation to reduce its GHG emisssions by at least 25 percent by the end of 2020 compared with 1990 levels. By contrast, in *Natur Og Ungdom,* the Supreme Court of Norway found that the issuance of ten petroleum production licenses did not involve a real and immediate threat on the rights to life or to private and family life under the ECHR.

In order to trace the basis of this obligation under the standard of care, the Hague District Court leaned on in Article 162 of book 6 of the Dutch Civil Code stipulating that a person can be held liable if there is a violation of personal right, a breach of a statutory duty or breach of the unwritten standard of due care that must be observed in society.[42]In addition to certain elements of the specific case law of the Dutch Supreme Court, the factors the Hague District Court took into account in determining the scope of the duty of care owed by the State were: (i) the nature and extent of climate change damage ensuing from climate change; (ii) the knowledge and foreseeability of this damage; (iii) the chance that hazardous climate change will occur; (iv) the nature of the acts (or omissions) of the State; (v) the onerousness of taking precautionary measures; (vi) the discretion of the state to execute its public duties-with due regard for the public law principles, all this in light of: the latest scientific knowledge; the available (technical) option to take security measures, and the cost-benefit ratio of the security measures to be taken.[43]. After considering these factors, the Court concluded that "to prevent hazardous climate change, the Netherlands must take reduction measures" in accordance with the 2 degree Celsius limit.[44]

Urgenda judgment has been described as the very first court decision…that orders a state to limit GHG emissions for reasons other than statutory mandates[45]. Some of the scholarships followed after the judgment expected that the case would open a new era of climate change litigation and lead to stricter climate policies.

Milieudefensie v. Shell Case[46]

Likewise of the *Urgenda* judgment (by contrast to the subsequent Supreme Court decision, which applied the European Convention on Human Rights), the main legal point in the *Miliuedefesie v. Shell* case was whether Shell's failure to further cut in emissions of greenhouse gases constituted a breach of tort law. The controversy revolved around the interpretation of Article 6:162(2) of the Dutch Civil Code, which defines "a tortious act as an act or omission in violation of a duty imposed

by law or of what according to unwritten law has to be regarded as proper social conduct". On November 12, 2024, the Hague Court of Appeal overturned the judgment of the Hague District Court in the Case. While some elements of the legal reasoning remained aligned with the District Court's decision, there were some notable shifts also. For instance, the Court of Appeal reaffirmed that Shell has a special duty of care to reduce greenhouse gases, in alignment with international and scientific goals, beyond existing European or domestic laws. In tort law, the standard of diligence for a given activity (the level of the "duty of care", in common law vocabulary) is inherently dynamic. It is determined therefore not only by reference to applicable laws and mandatory regulations, but also in relation to those "unwritten" yet recognizable norms of social conduct and best practices, shaped by both subjective and objective circumstances [47]. Like the first-degree decision, the Court of Appeal confirms that, in corporate climate responsibility, these "unwritten norms" derive from a wide array of sources, such as Articles 2 and 8 from the ECHR, the UN Guiding Principles on Business and Human Rights, the Paris Agreement, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and various soft laws and documents issued by private and public entities (such as the Intergovernmental Panel on Climate Change (IPCC) and the International Energy Agency (IEA) reports, or the scientific community recommendations).

The Court of Appeal reiterates that Shell, in order for its actions to be considered lawful, must take into account all this vast body of formal and informal provisions well beyond strict climate legislation (such as, at EU level, among others, the EUETS and the next ETS2 Directives, the Corporate Sustainability Reporting Directive, and the recent Corporate Sustainability Due Diligence Directive (CSDDD).

Validity of Legal Reasoning in Supply-Side Corporate Responsibility

One of the aspects of the judgment that has drawn considerable attention is the supply-side corporate climate responsibility for emissions. It is within limits if the corporates are asked to limit or curb their emissions for the first two categories of emissions: (i) Direct emissions released by the Company (ii) Indirect emissions, resulting from purchased energy.

But asking them to limit or reduce or put some restrictions on the third-party emissions comprising all the emitters in the value chain, including end-users, is apparently not justifiable. In the given case, Shell argued that it would be unfair to impose liability for emissions that are asked and bought by, third parties i.e. the final users. Shell maintained that companies cannot be held liable for merely providing the market goods that the market participants themselves need.

Juliana Case

In *Juliana v. United States,* the youth plaintiffs challenged the national government for its deliberate and extensive support of fossil fuel production notwithstanding the grave known dangers associated with greenhouse gas emissions. The plaintiffs in *Juliana* allege that the government actions in this regard constitute a violation of public trust doctrine since, they contend, atmospheric stability is a shared commons resource that the government is obliged to protect. Although not formally a cause of action, the Juliana plaintiffs do evoke tort by frequently referencing a duty of care on the part of the trustee governments[48].

Strengths and Limitations of Urgenda and Milieudefensie Judgment

Although scholars have suggested that the Urgenda judgment would open a new era of climate change litigation and lead to stricter climate policies, but the questions about the validity of the legal reasoning and interpretation of the scientific reports underpinning the determination of the Urgenda target have been raised. The Courts in other countries have dismissed cases, in particular on the ground that imposing a mitigation target fell beyond their constitutional power. Other cases on climate change mitigation decided in favour

of the plaintiffs were primarily concerned with consistency of a states conduct with its own laws, policies or strategies, rather than with the judicial determination of the mitigation target applicable to the defendants.

In the Shell Judgment, the Hague District Court derived from the reports of the Inter-govenmental Panel on Climate Change (IPCC). In fact, it has been found that these targets are vaguely informed by science, they essentially result from political agreements. The scientific method cannot make the value judgments necessary to determine the right balance between the costs and benefits of mitigation. It is notable that the IPCC is precluded from making any such policy recommendations.

The framing of the mischaracterized origin and nature of the temperature targets as something which the states are supposed to achieve through cooperation, not as a scientific necessity as presented in the judgment.

As regards the legal force of the temperature target, climate change literature refers to as 'collective obligation'. The Paris Agreement does not require its Parties to communicate or implement NDCs that are consistent with these targets. For lack of consistent state practice, an obligation of communicating or implementing goals consistent with the 1.5 or 2-degree temperature targets cannot be identified as customary law or subsequent state practice[49]. At most, the temperature targets indicate a standard of due diligence states must seek to reflect when implementing their general mitigation obligation, for instance by considering whether they can adopt consistent NDCs rather than a firm yardstick against which a state's obligation action could be assessed[50].

As regards *Urgenda* case, states certainly have an obligation to mitigate climate change as *parens patriae*- obviously so under climate treaties, and arguably so under customary law, and perhaps then also under tort law or (as the Supreme Court found in *Urgenda*) human rights treaties. But the same argument cannot be made with respect to private companies operating in a competitive environment; even in the case of a multi-national oil-and-gas company to which slightly over 2% of global historical emissions can be attributed[51]. In the *Milieudefensie* Case, the Hague District court interpreted Shell company's mitigation duty to be ensuing from Article 6:162 of the Dutch Civil Code[52]. This provision defines tortious acts as including acts and omissions 'in violation of … what according to unwritten law has to be regarded as proper social conduct'. Accordingly, the Court considered that Shell 'must observe the due care exercised in society', to be interpreted in the light of 'all circumstances of the case'.

Conclusions

As the impacts of climate change are becoming more life-threatening and the consequent climate change negotiations are proving to be disappointing in terms of national governments' lack of inclination in adopting more ambitious climate mitigation and and adaptation, climate change negotiations inspired from several bases, including duty of care, are going to increase in number. Duty of care linked judicial decisions discussed in the paper are built on shaky foundations, relying on scientific analysis or on a demand for consistency with the state's policies or with international trends in a vain quest for predetermined benchmarks. It is replete with difficulties when the Court or quasi-judicial bodies use the same argument against a multi-national oil company. In international legal system, multinational corporations (MNCs) are still not subjects of international law. In the context of climate change, the scholarship is being built, though on a shaky foundation, that MNCs should bear mitigation obligations likewise of state. The *Milieudefensie* Case, the *Urgenda* Case and the *Juliana* Case demonstrate that the growing emissions and the growing need to mitigate supported by the scientific evidence are important developments underpinned by duty of care arguments. They are expected to set the precedent for climate change litigations supported by duty of care arguments to protect climate.

Endnotes

1 IPCC Sixth Assessment Report confirms atmosphere has warmed on average 1.1 degree Celsius since pre-industrial times. https://www.ipcc.ch/report/ar6/wg1/chapter/summary-for-policymakers/

2 https://treaties.un.org/doc/Publication/UNTS/Volume%201771/v1771.pdf

3 Ibid. Article 4.2(a).

4 Ibid. Article 3(3) "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponinq such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. 'To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties".

5 *Caparo Industries plc v Dickman & Ors* [1990] HL AC 2, 605. In this case, an investor filed a claim against an accounting company (respondent) because it released an inaccurate statement on one of its corporate clients (the company). As a result, the claimant overpaid for the company's shares in a takeover offer. The House of Lords ruled the accounting company did not owe a duty of care towards the investor because they did not have a direct relationship.

6 Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (OUP, 2013) 137-138).

7 David Hunter and James Salzman, "Negligence in the Air: The Duty of Care in Climate Change Litigation", *University of Pennsylvania Law Review,* vol. 155. no. 6 (2007) at 1768.

8 *Trail Smelter* (U.S. v. Can.)3 R.I.A.A. 1938 (1941).

9 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,1996 I.C.J. 226, 29 (July 8).

10 Int'l Law Comm'n,Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 153 (2001).

11 The Sea-bed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), in its Advisory Opinion on *Responsibilities in the Area,* noted that the content of due diligence obligations is variable and may change over time and the standard has to be more severe for the riskier activities. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 2 ITLOS Rep. 10, 117.

12 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment,2010 I.C.J. 14, 203–04 (Apr. 20).

13 *Id*. 204.

14 *See generally* Protocol on Environmental Protection to the Antarctica Treaty Oct. 4, 1991, 30 I.L.M 1455(entered into force from 14 January 1998).

15 *See generally*U.N. Convention on the Law of the Sea, art. 206, Dec. 10 1982, 1833 U.N.T.S. 397(entered into force 16 November 1994).

16 *See* Benoit Mayer, *Climate Assessment as an Emerging Obligation under Customary International Law*, 68Int'l Com. L. Qr.,271, 281–82 (2019).

17 *Id*. at 283.

18 *See*Int'l Law Comm'n, Rep. on the Work of its Seventieth SessionU.N. Doc A/73/10,at 138–39 (2018) (draftingconclusions on identification of customary international law adopted in first reading)

19 *See Id.*at 143–51.

20 Pulp Mills on the River Uruguay, 2010 I.C.J. Rep. 204; Certain Activities Carried Out by Nicaragua in the Border Area (costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), 2015 I.C.J. Rep. 665, 101-105 and 142-162; See also Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion (ITLOS Seabed Disputes Chamber, 1 February 2011) 50 I.L.M. 458(2011) 141-150.

21 See Mayer, *supra* note 17, at 290.

22 U.N. Framework Convention on Climate Change, art. 2, June 20, 1992, 1771 U.N.T.S. 107 ("[T]he ultimate objective of the Convention and its related instrument is 'to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that

would prevent dangerous anthropogenic interference with the climate system."). In other words, stabilization is about prevention of dangerous interference with the climate system, which implies that the actual objective of the UNFCCC is the stabilization of the climate itself at safe levels.

23 Siobhan McInerney-Lankford et. al,World Bank,Human Rights and Climate Change: AReview of the International Legal Dimensions 46 (2011), http://documents.shihang.org/curated/zh/903741468339577637/pdf/613080PUB0Huma158344B09780821387207.pdf[https://perma.cc/YX5B-B93B]; *seealso* Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in theInternational Climate Change Negotiations*, 22J. Envtl. L.391,391–429 (2010) (reviewing current legal and policy frameworks governing climate change and its relation to human rights).

24 *See* Paris Agreement,pmbl., Apr. 22, 2016, 27 U.N.T.S. 7.d. (proclaiming a State duty to respect, promote and consider human rights obligations when taking action (e.g.NDCs) to address climate change).*See generally*, Ottavio Quirico, *Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation*, 65 Neth. INT'L. Law Rev. (2018) 185-215. In the context of serious objective and subjective obstacles in holding a state responsible for human rights violation on the ground of excessive release of greenhouse gas emissions, he has tried to argue that international recognition of a human right to a sustainable environment would require the plaintiff to only demonstrate direct causation, instead of indirect causation. In his view, such a right would allow attributing responsibility according to its share of the whole or based on minimum reduction reduction targets outlined in the Paris Agreement.

25 Roda Verheyen, Climate Change and International Law: Prevention Duties and State Responsibilities 176(2005).

26 *Id*. at176–84.

27 *Id*. at 161.

28 Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 153 (2001).

29 G.A. Res. 217 (III) A, art. 3, 12, 16, 25, Universal Declaration of Human Rights (Dec. 10, 1948).;U.N. GAOR, 3rd Sess.,U.N. Doc.A/810 (1948); International Covenant on Civil and Political Rights, art. 6, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights,art. 2, 8, Apr. 11, 1950,E.T.S. No.005.; African Charter on Human and Peoples Rights, art. 24, June 27, 1981,O.A.U. Doc.CAB/LEG/67/3/Rev.5,21I.L.M.58 (1982); Protocol of San Salvador, art. 11, Nov. 14, 1988, O.A.S.T.S. No.69,28I.L.M.156(1989).

30 Atanasov v Bulgaria,App. No. 12853/03 Eur. Ct. H.R. para.66 (2010).

31 Grimkovskaya v Ukraine, App. No. 38182/03 Eur. Ct. H.R. para.58 (2011).

32 Restatement (Second) Of Torts § 4 (Am. Law Inst. 1965).

33 *See generally* Percy H. Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 41 (1934)(explaining duty and its connection to the common law tort of negligence).

34 *Id*. at 41.

35 *See generally*, Andrew Hopkins, *The Need for a General Duty of Care*, 37Hous. J. Int'l L. 842–45 (2015) (Discussing the meaning and value of the duty of employers to reduce risk "as low as reasonably practicable").

36 United Nations Framework Convention on Climate Change, (UNFCCC) May 9, 1992, 1771 UNTS 107.

37 Paris Agreement, Dec. 12, 2015, 55 ILM 740 (2016).

38 The decisions adopted by the Parties to the UNFCCC, to the Kyoto Protocol and to the Paris Agreement are all available at<http://unfccc.int/decisions>.

39 *Urgenda v Netherlands*, ECLI:NL:HR:2019:2007 (Supreme Court, 20 December 2019), English translation in (2020) 59 ILM 811(*Urgenda* III). The Urgenda foundation, a not-for-profit organization that undertakes research and advocacy related to climate change, sued the Dutch government on behalf of itself and 886 individuals.

40 Benoit Mayer, Ejiltalk.org/milieudefensie-v-shell-do-oil-corporations-hold-a-duty-to-mitigate-climate-change/ June3, 2021; Paula Nieto, ejiltalk.org/the-market-substitution-argument-in-milieudefensie-et-al-v-shell-judgment-a-threat-to-justiciability-for-scope-3-emissions.

41 Urgenda Found.v.The Netherlands, The Hague Dist. Ct. (Chamber for Comm. Affairs June 24, 2015) [hereinafter *Urgenda*].

42 Art. 6:162 para. 2 BW (Neth.)(defining a tortious act).

43 *Urgenda*, *supra* note 5, 4.63.

44 *Id*. para. 4.83–4.84.

45 KJ de Graaf and JH Jans, "The Urgenda Decision:Netherlands Liable for Role in Causing Dangerous Global Climate Change" (2015) 27 *Journal of Environmental Law,* at 517, 527.

46 *Milieudefensie v Shell* case was brought by seven NGOs and 17,379 individuals. The Court did not allow standing to the individual claimants on ground that they lack "a sufficiently concrete individual interest". It admitted a class action by six of the NGOs, but only to represent the interests of the Netherlands residents. The Court did not give standing to the seventh NGO (Action Aid), which sought to represent the interests of foreign populations. The Court considered that this would bundle dissimilar interests, alluding huge differences in the time and manner in which the global population at various locations will be affected by global warming.

47 Carlo Vittorio Giabarda, "Corporate Climate Responsibility After "Milieudefensie vs. Shell" Court of Appeal Decision" *EJIL Blog*, 17th December, 2024. Available at https://www.ejiltalk.org/corporate-climate-responsibility-after-milieudefensie-vs-shell-court-of-appeal-decision/?utm_source= mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2

48 See Complaint for Declaratory and Injunctive Relief 13, 98, 286, 309, Juliana v. United States, 947 F.3d 1159 (2020). On Dec. 29, 2023, Judge Aiken ruled that her court would hear the case as based on the amended complaint. The three-judge Ninth Circuit panel ruled on May 1, 2024, that the plaintiffs lacked standing and ordered the lower court to dismiss the case with no option to amend their filings. On Sep 12, 2024, the plaintiffs asked the Supreme Court to overturn the Ninth Circuit's dismissal of the case. The Court denied to hear the appeal in March 2025.

49 Benoit Mayer, "Temperature Targets and State Obligations on the Mitigation of Climate Change", (2021) 33 *Journal of Environmental Law* 585, at 598-600.

50 *Ibid*., at 604-8.

51 R. Heede, ''Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854-2010' (2014) 122 *Climatic Change*, pp. 229-41, at 237. It is important to note that some emissions take place during Shell's operations, most of these emissions result from the combustion of fossil fuels provided by Shell to their consumers, from public utility companies to individual car drivers.

52 Milieudefensie, n.1 above, para. 4.4.1.

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Dr. Anwar Sadat is a Senior Assistant Professor in International Law at the Indian Society of International Law (ISIL). After obtaining M.A. (1998) M. Phil (2001) and Ph. D. (2006) from Jawaharlal Nehru University, he joined ISIL as a research associate in 2005 and in 2007 he was absorbed in the same institution as a regular faculty member. He is the course coordinator for the Post Graduate Diploma Course in International Environmental Law and Climate Change at the ISIL since 2010. He was selected as Sir Ratan Tata Fellow by the London School of Economics and Political Science (LSE, UK) for the year 2016-17 to do post-doctoral work in the field of climate change. He has contributed a number of articles in some of the leading journals in the field of law, social science and climate change *Carbon Climate Law Review, Economic and Political Weekly, Indian Journal of International Law,* and *Journal of Indian Law Institute*. In addition, he has been contributing regularly in open edit pages of *The Hindu*.

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